IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1462 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GHANSHYAM R SHARMA - Petitioner(s)
Versus
COMMANDANT & 1 - Respondent(s)

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Appearance :
MR IS SUPEHIA for Petitioner(s) : 1,
Mr. Hiren Modi, Asst. GOVERNMENT PLEADER for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 31/01/2007

ORAL JUDGMENT

This Special Civil Application has been filed under Article 226 of the Constitution of India challenging the impugned order of dismissal

dated 5.8.1993 by which on conclusion of the departmental enquiry the petitioner came to be dismissed from service.

2. The petitioner was appointed as a Police Constable in the State Reserve Police in the year 1983. Departmental enquiry was initiated against him and he was chargesheeted by chargesheet dated 23rd January 1991 by the Commandant, SRP, Group No.13, Rajkot and the charge against the petitioner was that in order to avoid going on duty to Ahmedabad the petitioner went on sick leave from 3.4.1990 and produced false medical certificate. That the Commandant, SRP No. 10, Ukai, held departmental enquiry and after giving reasonable opportunity found the petitioner guilty and submitted his report. Thereafter the Commandant issued a show cause notice dated 14.7.1993 calling upon the petitioner to show cause as to why he should not be dismissed from service. It is the case on behalf of the petitioner that the petitioner submitted his

reply to the aforesaid show cause notice and after considering the reply the Commandant dismissed the petitioner from service by order dated 5.8.1993. Being aggrieved and dissatisfied with the impugned order of dismissal dated 5.8.1993 the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

3. Shri Supehia, learned advocate appearing on behalf of the petitioner has assailed the impugned order by making following submissions;

(i) That the petitioner has been denied reasonable opportunity to defend himself at the departmental enquiry.

(ii) The petitioner was not permitted to engage friend,

(iii) the punishment of dismissal was not in

accordance with law,

(iv) while imposing punishment subsequent events have been considered.

(v) That the only charge against the petitioner is that he went on sick leave falsely in order to avoid going on duty to Ahmedabad and thus the punishment of dismissal is disproportionate and excessive.

(vi) That the respondent No.1 has not kept in mind the instructions contained in Rule 449 of the Bombay Police Manual while imposing the penalty, i.e., whether any lesser punishment should have been imposed or not.

4. Shri IS Supehia, learned advocate appearing on behalf of the petitioner has submitted that by letter dated 20th April 1993 the petitioner was informed by the Enquiry Officer that the enquiry proceedings were to be conducted in the District Jail, Rajkot on 5.5.1993 and 3

prosecution witnesses were to be examined on that date; when the Enquiry Officer visited the Jail on 5.5.1993 the petitioner requested for 15 days to engage a friend to assist him in the enquiry; and he made it clear that unless he got a friend he would not crossexamine the witnesses. However, the Enquiry Officer rejected the said request and petitioner was also informed that if so desired he could give the name of his friend within 10 days for the subsequent enquiry/proceedings. Thus a reasonable opportunity was not given to the petitioner to engage a friend and was also not permitted to crossexamine the witnesses and has been denied reasonable opportunity to defend his case. Shri Supehia has further submitted that in fact the petitioner was sick and was under medical advice and medical certificate of the Doctor was also produced regarding treatment and rest, still the petitioner has been held guilty. Therefore it is submitted that as such the petitioner has not committed any misconduct as he had not gone on

sick leave falsely. Shri Supehia has further submitted that assuming that the petitioner had avoided to go to Ahmedabad under the pretext of sickness still however that would not call for the maximum penalty of dismissal looking to the clean record of more than 10 years.

4.1. Shri Supehia has further submitted that as held by this Court in ***Mohanbhai Dungarbhai Parmar v. Y.B. Zala And Anr.,*** reported in ***20 GLR 457,*** the authority was required to consider the instructions contained in Rule 449 of the Bombay Police Manual while imposing the penalty,i.e., whether any lesser punishment should have been imposed or not and in the present case while imposing the penalty of dismissal the authority has not considered whether any lesser punishment could have been imposed or not and therefore the impugned order requires to be quashed and set aside.

5. Shri Supehia has further submitted that

while passing the impugned order of dismissal the respondent authority has considered the subsequent events such as petitioner was in jail and that he was absent after 1991 without any leave. Relying upon Judgment of the Hon'ble Supreme Court in the case of ***The State of Mysore v. K. Manche Gowda,*** reported in ***AIR 1964 S.C. 506*** it is submitted that the petitioner must have been given reasonable opportunity not only to prove that he was not guilty of charges levelled against him but also to establish that punishment proposed to be imposed is not called for and/or is excessive. Therefore it is requested to allow the present Special Civil Application and to quash and set aside the order of dismissal.

6. The petition is opposed by the learned AGP. Relying upon the observations in the Enquiry Report, Shri Modi, learned AGP has submitted that ample opportunity was given to the petitioner initially to engage a friend but the petitioner did not engage a friend. It is

submitted that a reasonable opportunity has been given to the petitioner however the petitioner did not avail the same and did not crossexamine the witnesses. It is further submitted that on facts more particularly when the petitioner was in the disciplined force, i.e., in Gujarat Reserve Police Force and when his services were required he went on sick leave falsely to avoid to resume duty at Ahmedabad and in a disciplined force like State Reserve Police such conduct cannot be tolerated and therefore in the facts and circumstances of the case the order of dismissal is neither excessive nor disproportionate. Meeting with the decision of the Hon'ble Supreme Court in the case of ***K. Manche Gowda [supra]*** Shri Modi has submitted that the Hon'ble Supreme Court in the said case was considering the scope and ambit of Article 311 of the Constitution of India. However subsequently by way of amendment in Article 311, sub-clause (2) thereof has been deleted and by virtue of such amendment second show cause notice was not

required to be issued and therefore any observation in the said decision will not be of any assistance to the petitioner as as per the law prevailing at the time when the case of the petitioner was considered there was no such provision under which second show cause notice can be issued with regard to punishment. Meeting with the judgment of this Court in the case of ***Mohanbhai Dungarbhai Parmar [supra]*** it is submitted that even the law has been changed subsequently and in catena of decisions the Hon'ble Supreme Court has held that so far as quantum of punishment is concerned once the charges are proved it is ultimately for the disciplinary authority to consider the same and this Court is not sitting as an appellate authority against the order of punishment. Therefore it is submitted that even the said judgment will also be of not assistance to the petitioner. It is submitted that even otherwise on merits also as stated above the only order which could have been passed was of dismissal and

therefore it is requested to dismiss the present Special Civil Application.

7. Heard the learned advocates appearing on behalf of respective parties. It is required to be noted that the petitioner was serving as Constable in the State Reserve Police which is a disciplined force. The charge against the petitioner was that the SRP Group No. 13 'A' Company was transferred to Ahmedabad and along with the said Company the petitioner was also required to go to Ahmedabad, however with a view to see that he does not resume duty at Ahmedabad along with the said company he has obtained a false medical certificate and created a ground of sickness and did not resume duty at Ahmedabad. It appears that the petitioner did not get the treatment from the Civil Hospital and/or any other Government Hospital however subsequently got the certificate from one RMP. The charge against the petitioner is held to be proved by the Enquiry Officer. On going through the

Enquiry Report it appears to the Court that a reasonable opportunity has been given to the petitioner to defend his case and even to engage a friend earlier. It is observed in the Enquiry Report that the petitioner was served with the chargesheet on 31.1.1991 and the Enquiry Officer was appointed by order dated 7.10.1991. Before that the petitioner was transferred to Ukai by order dated 26.3.1991 and was relieved on 30th March 1991. However, till the Enquiry Officer submitted his report the petitioner had remained absent unauthorisedly without informing the department and without sanction of leave. It appears that even the intimation with regard to appointment of Enquiry Officer was also not accepted by the petitioner and the petitioner insisted that the same should be sent by post at Ukai. It appears that thereafter the petitioner was requested by the Enquiry Officer to submit his preliminary statement and to remain present before the Enquiry Officer by communications dated 30th October 1991 and 21.11.1991. However

the petitioner did not report before the Enquiry Officer. It appears that thereafter by communication dated 2.1.1992 the petitioner prayed for adjournment on the ground of sickness which was granted. Again by communications dated 17.1.1992 and 22nd March 1992 the petitioner was directed to remain present before the I.O., but the petitioner did not remain present. It appears that thereafter the petitioner was arrested in connection with same other case and was at Rajkot Jail. The petitioner requested for appointment of a friend, however the petitioner has submitted that after his release from jail he can find out his friend. Thereafter no efforts were made by the petitioner to engage a friend. Thereafter again by communication dated 24.11.1992 the petitioner was directed to name his friend but the petitioner did not furnish the name of his friend. Thereafter again the petitioner was directed to remain present before the I.O. but the petitioner did not remain present. Thereafter twice the petitioner was in

Rajkot jail and hearing was fixed at Rajkot jail, enquiry was conducted there, and after giving opportunity to the petitioner the charge levelled against the petitioner has been proved. It is the contention on behalf of the petitioner that the petitioner's plea made in the month of May 1993 to engage a friend was rejected. It appears that earlier ample opportunity was given to the petitioner to engage a friend but the petitioner did not avail the said opportunity and when subsequently the prayer was made the authority rejected the same by holding that the petitioner wants to delay the departmental enquiry. In the facts and circumstances of the case narrated hereinabove, it cannot be said that rejection of such a prayer was illegal and/or arbitrary. As stated above, ample opportunity was given to the petitioner earlier to engage a friend and the petitioner did not avail of the same and the Enquiry Officer was justified in subsequently observing that only with a view to delay the proceedings a belated application is made to

allow him to engage a friend. It is also required to be noted that when the application was given on 5.5.1993 by the petitioner delinquent to permit him to engage a friend the same was rejected on that date, however for the subsequent proceedings he was told to name the friend within 15 days and the petitioner failed to do the same. Thus, in the facts and circumstances of the case it cannot be said that reasonable opportunity has not been given to the petitioner. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of ***K. Manche Gowda (supra)*** is concerned, it is required to noted that in the said decision, the Hon'ble Supreme Court was dealing with Article 311 (2) of the Constitution of India and the opportunity to be given by way of second show cause notice against the proposed penalty and what is required to be mentioned in the second show cause notice. It is required to be noted that the requirement of second show cause notice as provided under Article 311(2) was

subsequently deleted and at the time when the case of the petitioner was considered there was no requirement of issuing second show cause notice as provided Article 311(2) of the Constitution which has subsequently been deleted. Under the circumstances, the decision of the Hon'ble Supreme Court in the said case would not be of any assistance to the petitioner. As such when clause (2) of Article 311 of the Constitution of India has been deleted, the learned counsel appearing on behalf of the petitioner ought to have shown the authority which was dealing with Article 311(2) of the Constitution.

8. So far as the contention on behalf of the petitioner that it was only a case of remaining on sick leave falsely and therefore the order of punishment is disproportionate to the charge proveed against the petitioner and it is too harsh. It is required to be noted and as stated above the petitioner was serving in the

disciplined force of State Reserve Police and his entire company was transferred to Ahmedabad, and with a view to avoid going on duty to Ahmedabad the petitioner went on sick leave falsely. As such the conduct on the part of the petitioner in the disciplined force cannot be tolerated. Under the circumstances, the only order of punishment which is required to be passed was of dismissal and therefore the disciplinary authority has not committed any illegality in passing the order of dismissal. The reliance placed upon the Judgment of this Court in the case of ***Mohanbhai Dungarbhai Parmar [supra]***, on the issue of non-consideration of a lesser punishment by the disciplinary authority is concerned, it is required to be noted that after the said judgment the law has been changed and in catena of decisions the Hon'ble Supreme Court has held that once the charge and the misconduct is proved and the order of punishment has been imposed, it is ultimately for the competent authority to impose the punishment and

the Court is not required to substitute its own decision, and is not required to consider the proportionality as the Court is not sitting as an appellate authority on the order of punishment. For that purpose, the judgment of the Hon'ble Supreme Court in the case of ***V. Ramana Vs. A.P. State Road Transport Corporation,*** reported in ***[2005] 7 SCC P. 338*** is required to be referred to.

9. Thus, considering the charge and the misconduct proved against the petitioner of remaining on sick leave falsely to avoid to join duty at Ahmedabad along with his company, it cannot be said that the order of dismissal is either disproportionate to the misconduct and/or is too harsh. It cannot also be said that the disciplinary authority has committed any illegality and/or acted contrary to the law and/or has acted arbitrarily in imposing the punishment of dismissal.

10. For the reasons stated above, the

petition fails. Rule is discharged. However, there shall be no order as to costs.

[M.R. Shah, J.]

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